

THE APPOINTMENT OF EQUITABLE RECEIVERS: APPLICATION OF RULES OR EXERCISE OF PURE DISCRETION?

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The cases purporting to apply the rules developed by the courts since the turn of the century to govern appointment of equitable receivers for the enforcement of judgments are often conflicting inter se or incomplete in analysis. A recent response to the unsatisfactory state of this area of creditor-debtor law has been to jettison the rules and revert to untrammelled discretion. The thesis of this article is that a proper understanding and application of the rules would provide the desired flexibility. It would render the recent reversion to pure discretion redundant and would promote greater certainty and consistency in decision-making than currently exists or would exist if the appointment of equitable receivers was again to become purely discretionary.

Les décisions qui sont censées refléter les règles instaurées depuis le début du siècle par les tribunaux en matière de nominations des séquestres en équité responsables de la mise en application des jugements sont souvent contradictoires ou bien n'offrent qu'une analyse incomplète. Pour remédier à l'état peu satisfaisant de ce domaine du droit sur les créanciers et débiteurs, on a récemment été tenté de rejeter les règles pour retourner à la simplicité qu'offre la discrétion. L'auteur de cet article soutient que la bonne compréhension des règles et leur application correcte permettraient d'obtenir la flexibilité désirée. Le retour à la pure discrétion perdrait alors son attrait et les décisions seraient moins incertaines et moins disparates qu'elles ne le sont actuellement ou qu'elles ne le seraient si l'on décidait d'adopter, pour la nomination des séquestres en équité, la discrétion pure et simple.

Introduction

The appointment of equitable receivers originated in the English Court of Chancery. The Judicature Act 1873,¹ which merged the courts of law and equity, substituted statutory authority for this appointing power when by section 25(8) it provided:

A mandamus or an injunction may be granted or a receiver appointed by interlocutory Order of the Court in all cases in which it shall appear to the Court to be just and convenient that such Order should be made; and any such Order may be made either unconditionally or upon such terms and conditions as the Court shall think just . . .

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¹ 36 & 37 Vict. c. 66 (U.K.).

Though the potential of the injunction as an aid to collection of debts was not realized until the judgments of Lord Denning in 1975 in *Nippon Yusen Kaisha v. Karageorgis*² and *Mareva Compania Naviera S.A. v. International Bulk Carriers S.A.*,³ the English judges of the merged court at first freely exercised the specific equitable jurisdiction to appoint receivers for the benefit of judgment creditors. They clearly considered that their equitable jurisdiction empowered them to impose a liberal gloss on the narrow common law rules governing collection of judgment debts.

Towards the turn of the century, however, for reasons which remain speculative, the Court of Appeal abandoned the early liberality in the appointment of equitable receivers for the benefit of judgment creditors.⁴ The simple question of whether such an appointment would be just and convenient was subordinated to a set of rules which rivalled those of the common law for narrowness, though they were not completely rigid. These self-imposed limits on equitable jurisdiction prevented the development of equitable execution as a residual supplement to the legal processes of enforcement of judgments. Classes of assets not exigible at law remained immune from equitable relief under section 25(8) of the Judicature Act, 1873 and its successors. Common law jurisdictions in Canada, each of which enacted some version⁵ of section 25(8) of the Supreme Court of Judicature Act, 1873 followed the same pattern.

Since the late nineteenth century, then, courts both in England and Canada have purported to apply this set of rules whenever an application has been made for the appointment of an equitable receiver, yet a comment of Kekewich J. in 1907, when called upon to decide on the availability of equitable execution, is as apt now as it was then:⁶

² [1975] 1 W.L.R. 1093, [1975] 3 All E.R. 282 (C.A.).

³ [1975] 2 Lloyd's L.R. 509, [1980] 1 All E.R. 213 n. (C.A.).

⁴ For a discussion of equitable receivers generally, including the pre-Judicature Act, 1873 period, see C.R.B. Dunlop, *Creditor-Debtor Law in Canada* (1981), c. 9, and I.C.F. Spry, *Equitable Remedies* (1971), c. 1. All the general texts on receivers include chapters on equitable receivers. See, for example, R. Walton (ed.), *Kerr on Receivers* (16th ed., 1983); H. Picarda, *The Law Relating to Receivers and Managers* (1984).

The Court of Appeal cases which formulated the narrow rules referred to include: *Manchester and Liverpool District Banking Co. Ltd. v. Parkinson* (1888), 22 Q.B.D. 173 (C.A.); *Re Shephard; Atkins v. Shephard* (1889), 43 Ch. D. 131 (C.A.); *Harris v. Beauchamp Bros.*, [1894] 1 Q.B. 801 (C.A.); *Holmes v. Millage*, [1893] 1 Q.B. 551 (C.A.); *Morgan v. Hart*, [1914] 2 K.B. 183 (C.A.).

⁵ Law and Equity Act, R.S.B.C. 1979, c. 224, s. 36; Judicature Act, R.S.A. 1980, c. J-1, s. 13(2); Queen's Bench Act, R.S.S. 1978, c. Q-1, s. 45(8); Queen's Bench Act, R.S.M. 1970, c. c-280, s. 59; Courts of Justice Act, S.O. 1984, c. 11, s. 114(1); Judicature Act, S.N.S. 1972, c. 2, s. 39(9); Judicature Act, R.S.N.B. 1973, c. J-2, s. 33 (am. 1981, c. 6, s. 1); Judicature Act, R.S.P.E.I. 1974, c. J-3, s. 15(4); Judicature Act, R.S.N. 1970, c. 187, s. 21(m). Each province may also have provisions in its Rules of Court concerning appointment of receivers. The Federal Court Act, S.C. 1970-71-72, c. 1, confers similar jurisdiction on federal court judges by s. 44.

⁶ *Ideal Bedding Co. Ltd. v. Holland*, [1907] 2 Ch. 157, at p. 168 (Ch. D.).

After consulting many authorities and pondering over the matter, I have come to the conclusion that full treatment of this question would require something in the nature of a lecture or treatise . . . The authorities bearing on the point cannot be said to be wholly satisfactory, and the law must be taken to be still in the making.

One hopes that no other area of the law contains as many actually and apparently conflicting and unsatisfactory cases as that part of debtor-creditor law which concerns the appointment of equitable receivers. The rules are deceptively simple to state: first, the asset must be of a kind that is exigible by a common law or legal process;⁷ second, there must be some impediment to employment of a legal process; third, there must be some benefit to be obtained by the appointing of an equitable receiver and the appointment must be just and convenient; but fourth, special circumstances established by the judgment creditor may permit the court to disregard the second rule. The cause for the unsatisfactory state of the law appears to be a lack of common understanding about the meaning, the relationship, and sometimes even the existence of these rules. Individual rules are applied differently from case to case. Since the variation may be in another jurisdiction or in a coordinate court in the same jurisdiction all versions live on. Sometimes one of the rules and sometimes even all the rules are inexplicably ignored. Sometimes it is even unclear what asset the court is appointing a receiver for. In *Vancouver A & W Drive-Ins Ltd. v. United Food Services Ltd.*⁸ for example, was the receiver appointed for the Registered Retirement Saving Plan or for the interest of the judgment debtor in property in which the funds were invested? The conclusion one reaches on this issue determines the formulation of the first rule. The relationship of the special circumstances exception to the rules appears to be another uncertain matter as it is not always limited to rendering failure to satisfy the second rule irrelevant. A further source of confusion is the existence of dicta about the availability of equitable execution in cases concerning the validity of some legal process. Finally, a few recent cases appear to have taken a great leap backwards in time, abandoning a strict application of the rules in favour of pure discretion, but suggesting retention of the rules as guidelines or factors for consideration in the exercise of discretion.

This article is not the general lecture or treatise on equitable receivers contemplated by Kekewich J.⁹ Many issues are ignored,¹⁰ and the

⁷ That is by a common law writ such as *fieri facias* or by a process created by statute such as garnishment.

⁸ (1981), 13 B.L.R. 89 (B.C.S.C.).

⁹ For that, see Dunlop, *op. cit.*, footnote 4; Ontario Law Reform Commission, Report on the Enforcement of Judgment Debts and Related Matters (1981), Part II. A modern English text, H. Picarda, *op. cit.*, footnote 4, p. 227 n. 4, states that "[t]he best modern survey of the English law is, paradoxically, a Canadian work . . .", referring to Dunlop, *ibid.*

¹⁰ Issues not discussed include the jurisdiction of lower courts to appoint equitable receivers, the constitutionality of empowering inferior courts to appoint equitable receivers,

only cases considered are those decided during and after the constriction of the equitable jurisdiction to appoint receivers by the Court of Appeal in the late nineteenth and the early twentieth centuries. The objective is to identify the causes of the existing inconsistencies, to discuss the possible formulations of the rules and their interrelationship and to advocate consistent employment of the version of the rules which renders resort to pure discretion unnecessary. If the courts do revert to a discretionary approach, and the rules are converted to mere guidelines, a consistent formulation will remain a necessary condition for utility and the discussion which follows will remain relevant although no longer of such critical importance for the obtaining of equitable relief for judgment creditors.

I. *The Rules*

Problems exist with respect to each of the rules, but the most difficult problem concerns the first rule. The first rule is the most crucial because failure to satisfy the court that the property is exigible should stop the application *in limine*: equitable execution is not a residual execution process. That the application occasionally succeeds even when the property is held not to be exigible is attributable to an extension (or misuse) of the special circumstances exception or to an overriding exercise of discretion. The major problem lies in the definition or classification of the property in question and is rendered more difficult because that classification is usually implicit. One must determine the question asked not from any express discussion of it in the cases but rather from the conclusions reached.

A. *The Exigibility of the Asset*

Common law divides all property into two categories, real property and personal property. Common law or statutory processes of execution have never reached all the assets in each category nor have they always reached every interest in exigible assets, although the variety of exigible assets as well as the range of exigible interests in assets have been expanded by statute and by judicial decision to the point where very little now escapes the legal processes of execution. Exigibility of particular assets and of particular interests in assets may, of course, vary from jurisdiction to jurisdiction. For example, patents and copyrights constitute items of personal property. They were not amenable to the writ of *fiери facias* in England¹¹ and are not so yet in British Columbia, but have been made

ers, the effect for priorities issues of the appointment of an equitable receiver, and the relationship of receivers authorized by family law legislation to equitable receivers. For speculation as to the last issue, see Dunlop, *op. cit.*, footnote 4, Second Cumulative Supplement 1986, pp. 247-248.

¹¹ *Edwards v. Picard*, [1909] 2 K.B. 903 (C.A.). What the applicant wanted in this case was actually a receiver of the "rents, profits and moneys" receivable from the patents, but the evidence revealed that the patents were in fact producing no income.

so by statute in Ontario.¹² One British Columbia Supreme Court decision¹³ did give the Court Order Enforcement Act¹⁴ of that province an interpretation that would have rendered all types of personal property and probably all interests in each type subject to a writ of seizure and sale, but that decision has not been followed in subsequent cases,¹⁵ so patents and copyrights remain totally immune in British Columbia from any legal process of execution. Shares are also personal property. They were and still are immune from the common law writ of *fieri facias* in England, but in 1838 the Judgments Act¹⁶ made shares in public companies in England and all interests in such shares exigible by way of a charging order. In Canadian jurisdictions, on the other hand, shares were rendered amenable to the writ of *fieri facias* by statute and the writ was gradually extended, either by additional legislation or judicial decision to beneficial interests in shares and to shares of different kinds.

The first rule for the appointment of an equitable receiver is that the applicant must satisfy the court that the asset is exigible in his jurisdiction by some legal process. This is apparently straightforward. *Prima facie* the court simply classifies the asset and determines whether legal process could be issued in respect of it. The cases reveal, however, that the question actually or implicitly posed as to exigibility must vary in form. One form, the form most favourable to the applicant, asks whether the *general class of assets* represented by the particular asset is exigible at common law. A second version, slightly less favourable to the judgment creditor, asks whether the *particular asset* or class of assets is exigible at common law. The third and least favourable version incorporates a time element in the question and asks whether the specific asset is exigible by means of a common law process *at the time of the application* in circumstances then existing. None of the cases discuss these variations. It is submitted that the first version is the original version and is the one which can and should still be employed since it has never been expressly rejected and since it produces a more rational approach to appointment of equitable receivers.

In England the property for which an equitable receiver originally was sought with overwhelming frequency was real property. At common

The lack of income was relevant to the third issue to be discussed in this article, the benefit to be derived from equitable intervention. Thus, the exigibility of the patents was not relevant though it was commented on by the Court of Appeal. It would have been crucial if the only legal process were *fieri facias*. The alternative here was, of course, garnishment.

¹² Execution Act, R.S.O. 1980, c. 146, s. 17.

¹³ *Vancouver A & W Drive-Ins Ltd. v. United Food Services Ltd.*, *supra*, footnote 8.

¹⁴ R.S.B.C. 1979, c.75.

¹⁵ *Bank of B.C. v. 225280 B.C. Ltd.* (1985), 62 B.C.L.R. 294 (B.C.S.C.).

¹⁶ 1 & 2 Vict., c. 110.

law two writs could issue against land, *levari facias* and *elegit*. *Levari facias* empowered the sheriff to proceed against the produce of the judgment debtor's land as it became available. The produce included "crops, rents and the like, and leases".¹⁷ The writ of *levari facias* fell into disuse after the creation by the Statute of Westminster, 1285,¹⁸ of the writ of *elegit*. *Elegit* permitted the sheriff to seize the chattels of the judgment debtor and to deliver them to the judgment creditor after appraisal. If the debt remained unsatisfied the sheriff was empowered by the writ to put the creditor in possession of the land so that he could collect its income until the debt was satisfied. The defect of *elegit* was that it extended only to legal interests in land. Where, therefore, the interest in land of the judgment debtor was equitable only, equity gave relief by appointing an equitable receiver.

In its origin, therefore, equitable execution was available in circumstances in which the general class of assets was land and the impediment to legal process consisted of the nature of the judgment debtor's interest in the exigible asset. The point to note for purposes of the first rule is that the class of exigible assets is a class of one. Land comprises the whole class. There are no sub-categories of real property though there is a wide variety of interests in it.

Personal property, on the other hand, is divisible into a great many sub-categories and those sub-categories are themselves divisible. Unsurprisingly, it is the cases in which the judgment creditor has sought equitable relief with respect to personal property that are the least consistent.

Where no single legal process encompasses the entire class of personal property, the judgment creditor must find specific authorization for employing the legal execution process selected against the particular item of personal property he is after. Classification and sub-classification are thus virtually automatic in most jurisdictions when using a legal process of execution. In deciding whether certain personal property is exigible on an application to appoint an equitable receiver for it, the same process of classification occurs. A range of options faces the court. A money obligation might be classified as a chose in action, as a particular kind of chose in action known as debt, as a particular kind of a debt such as a bank account or wages or as a class of one—the specific kind of debt in the specific circumstances existing at the time of the application. Shares, another chose in action, present a similar range of optional classes: choses in action; shares; shares of a particular kind such as shares with transfer restrictions; or the specific shares in question.

How the court classifies the asset for which an equitable receiver is sought is crucial to the success of the application. The narrower and

¹⁷ T. Plucknett, *A Concise History of the Common Law* (5th ed., 1956), p. 390.

¹⁸ See Plucknett, *ibid.*, pp. 390-391; Dunlop, *op. cit.*, footnote 4, p. 130.

more precise the classification of the property the less the likelihood of satisfying the first rule, and thus, the less the likelihood of having an equitable receiver appointed. Both this proposition and the proposition that classification varies from case to case are illustrated by two share cases.

Shares, generally speaking, are exigible, but in the recent past in some provinces the writ of *fiери facias* has not extended to shares with transfer restrictions, to shares in which the judgment debtor had only an equitable interest, or to shares in foreign corporations. Thus, if a judgment creditor wanted an equitable receiver appointed for shares and the court asked whether shares as a general class were exigible the answer would have been affirmative and the first rule satisfied, but if the question was whether a particular subclass of shares, such as shares with transfer restrictions or shares in which the judgment debtor had only an equitable interest, was exigible the answer in many provinces at one time would have been negative, the applicant would have failed to satisfy the first rule, and the application for an equitable receiver would have been refused.

*Vancouver A & W Drive-Ins Ltd. v. United Food Services Ltd.*¹⁹ is an example of the first approach. In that case the judgment debtor was the beneficial owner of a self administered Registered Retirement Savings Plan. Yorkshire Trust was the trustee. The funds were invested in shares in federally incorporated companies. The judgment creditor applied in the alternative for a declaration that the Plan could be garnished, a declaration that the Plan was subject to a writ of seizure and sale, an order directing the trust company to sell the funds, stocks and securities comprising the Plan, an order charging the funds, stocks and securities pursuant to the Judgments Act, 1838²⁰ or (though it probably should have been "and") finally, an order for directions concerning such sales pursuant to R. 42(26) of the Rules of the Supreme Court.

The first and second forms of relief requested consisted of legal processes of execution, a garnishing order and a writ of seizure and sale. Fulton J. held that neither was available. Arguably he was in error on both issues,²¹ but since an equitable receiver was ultimately appointed

¹⁹ *Supra*, footnote 8.

²⁰ *Supra*, footnote 16.

²¹ The garnishability of an R.R.S.P. has not been judicially reviewed since this decision. British Columbia has a unique definition of garnishable property. The province borrowed the definition from Manitoba which had borrowed it from Ontario: *Dunlop, op. cit.*, footnote 4, p. 235. Rejected by both provinces, it lives on in British Columbia in s. 7 of the Court Order Enforcement Act, *supra*, footnote 14:

Except as hereafter mentioned, the expression "debts, obligations and liabilities" in section 4, and that expression or any of the words composing it, when used in an order made under section 4, does not comprise an obligation or liability not arising out of trust or contract, unless judgment has been recovered on it against the gar-

the significance of the decision on these issues is not its correctness but that it establishes conclusively that the question concerning exigibility must have been asked in its most general form. Indeed, Fulton J. actually stated "[t]he interest of the judgment debtor [in the fund and in stocks and securities generally in which the funds were invested] is *personal property* and *personal property* is normally subject to execution . . .".²² Had the property been more narrowly classified for purposes of the first rule as a trust fund or as shares in foreign corporations, then the first rule concerning exigibility at law would have been unsatisfied because Fulton J. had just held legal processes of execution to be unavailable for those specific forms of personal property and no receiver should have been appointed. Employment of a general definition of property for purposes of the first rule, however, allowed the specific characteristics of the property to be treated as an impediment removable by appointment of an equitable receiver.

In contrast, the narrowest possible form of the question was operative in *Goodbun v. Mitchell*.²³ The judgment debtor there owned fifty

nishee, but, though not so as to restrict further the general sense of the words, the expression in the section or in any order shall be construed to include all claims and demands of the defendant, judgment debtor, or person liable under the order for payment of money against the garnishee arising out of trusts or contract where the claims and demands could be made available under equitable execution.

Hutchinson L.J.S.C. has described s. 7 as "language calculated to give nightmares to those who attempt its interpretation": *Royal Bank of Canada v. Gustin* (1983), 41 B.C.L.R. 150, at p. 154 (B.C.S.C.). Nevertheless, however convoluted the language, there is no doubt that s. 7 authorizes garnishment of obligations arising out of trusts. See, for example, *First Western Capital v. Hancock* (1984), 55 B.C.L.R. 273 (B.C.S.C.); *Dunwoody Ltd. v. Howe* (B.C.S.C.), unrep. Vancouver Registry No. C820712, April 23, 1982; *Pollard Morgan v. Atkinson* (B.C.S.C.), unrep. Vancouver Registry No. C855478, April 7, 1986; *Skybound Developments Ltd. v. Hughes Properties Ltd.* (1985), 65 B.C.L.R. 79 (B.C.C.A.). Thus there is no reason arising from the beneficial nature of the judgment debtor's interest that prevents garnishment though there may be circumstances in which collapsing the R.R.S.P. might be considered unjust. In *Vancouver A & W Drive-Ins Ltd.*, *supra*, footnote 8, Fulton J. was concerned about the widom of execution against retirement funds. In *Yorkshire Trust Co. v. 239745 B.C. Ltd. and Day* (1983), 45 B.C.L.R. 361 (B.C.S.C.), the judgment was under appeal and the court was concerned that if the appeal succeeded the consequences of immediate collapse of the R.R.S.P. would be irreversible. These considerations go to the question of discretion but not to the question of validity of a garnishing order.

The issue as to the availability of a writ of seizure and sale was decided on the basis that the property to be seized was shares, not the R.R.S.P. The interpretation given to s. 58 of the Court Order Enforcement Act was unique in that it limited exigibility to shares in B.C. companies whereas previous interpretations had permitted execution against the shares of any company carrying on business in the province. See E.R. Edinger, *Execution Against Shares in British Columbia*, in M.A. Springman and E. Gertner (eds.), *Debtor-Creditor Practice and Doctrine* (1984), c. 3.

²² *Supra*, footnote 8, at p. 104. (Emphasis added).

²³ [1929] 3 W.W.R. 622 (Man. C.A.).

shares in a federally incorporated company. The head office of the company was in Toronto and the company had no presence in Manitoba although the actual share certificates were within the province. Because the method of execution against shares prescribed by Manitoba statute required the sheriff to notify the company, the shares were held immune from execution at law, there being no corporate presence within the province where the sheriff could serve the appropriate notices. Because the shares were not exigible at law an equitable receiver could not be appointed. The Manitoba Court of Appeal did not ask whether shares generally were exigible at law or even whether shares in foreign corporations were exigible at law. It asked whether the specific shares in question were then exigible at law.

In summary, the British Columbia Supreme Court in *Vancouver A & W Drive-Ins Ltd.* postulated a class consisting of personal property and all interests in personal property, relied on a unique (though eminently desirable from a creditor's point of view) interpretation of section 49 of the Court Order Enforcement Act²⁴ as providing that all interests in personal property were subject to a writ of seizure and sale and characterized the foreign nature of the shares as impediments. In *Goodbun*, on the other hand, the Manitoba Court of Appeal considered that the foreign nature of the specific shares was an integral part of the description of the class of property instead of just an impediment.

Garnishment, of course, is available only for debts which are unconditional. That proposition, though generally accurate, cannot be taken literally. Effluxion of time for actual payment is no longer a legally significant condition and some cases have held that other "conditions" may not be legally significant in an application for a garnishing order.²⁵ On an application for a garnishing order the circumstances surrounding the obligation must be examined and the existence of any legally significant conditions determined as of the time of the application. Two kinds of money obligations that judgment creditors commonly covet are wages and salary, and rent. The entire contracts rule makes wages and salary a conditional debt and so practically impossible to garnish in the absence

²⁴ *Supra*, footnote 14.

²⁵ Bank accounts do not in law constitute a debt owing from the bank to the customer until a demand for payment is made by the customer, and yet the condition of a demand is overlooked. Service of the garnishing order on the bank is said to constitute the demand, but the time for determining validity is the time when the garnishing order is issued. In *Bel-Fran Investments Ltd. v. Pantuity Holdings Ltd. and Bank of Montreal*, [1975] 6 W.W.R. 374 (B.C.S.C.), "conditions" attaching to a term deposit were characterized as mere matters of procedure and administration satisfied by service of the garnishing order. Cf., *Provincial Treasurer of Alberta and R. in Right of Canada v. Hutterian Brethern Church of Smoky Lake* (1980), 12 Alta. L.R. (2d) 368 (Alta. C.A.).

of legislative intervention, either in the form of an Apportionment Act²⁶ deeming the wages to accrue from day to day and so be unconditional at the time of issuance of the garnishing order, or in the form of statutory permission to issue the garnishing order before the wages are fully earned.²⁷ Similarly, as explained by the British Columbia Court of Appeal in *Access Mortgage Group Ltd. v. Stuart*,²⁸ rent not yet due is subject to the condition of continued tenancy by the potential garnishee and so is *prima facie* not garnishable either unless it is overdue.

Frequent applications are made to have an equitable receiver appointed to collect future earnings, future rent and other such near debts. These

²⁶ Manitoba, Ontario, Nova Scotia, Prince Edward Island have Apportionment Acts: Apportionment Act, C.C.S.M., c. A-100; Apportionment Act, R.S.O. 1980, c. 23; Apportionment Act, R.S.N.S. 1967, c. 10; Apportionment Act, R.S.P.E.I. 1974, c. A-12. Alberta has apportionment provisions in the Rules of Court. See generally Dunlop, *op. cit.*, footnote 4, pp. 255-262.

²⁷ See, for example, s. 4(7) of the Court Order Enforcement Act, *supra*, footnote 15, which provides:

In this section, the expressions "debt due" and "debts due" include debts, obligations and liabilities owing, payable or accruing due and wages that would in the ordinary course of employment become owing, payable or due within 7 days after the date on which an affidavit has been sworn under subsection (1) or subsection (2).

Saskatchewan and Manitoba have similar rules: Attachment of Debts Act, R.S.S. 1978, c. a-32, s. 5(1); Garnishment Act, C.C.S.M. c. g-20, s. 5 (re-enacted 1979, c. 8, s. 1).

²⁸ (1984), 6 D.L.R. (4th) 260 (B.C.C.A.). It is arguable that future rent is garnishable under the final clauses of s. 7 of the Court Order Enforcement Act, *supra*, footnote 14. The section is reproduced in footnote 21. If garnishment depends on the availability of equitable execution and the availability of equitable execution depends on whether legal execution is available, the section simply sets up a *circulus inextricabilis*. Few cases have attempted to utilize the reference to equitable execution. To ascertain the intentions of the legislative draftsmen is now impossible. Nevertheless, one can speculate on what the draftsmen may have had in mind considering the state of the law at the time the provision was first enacted. That date appears to have been 1887, and the jurisdiction was Ontario. The enactment of the extended definition precedes the constriction of equitable receivership by the creation of fixed rules. Could the draftsmen have had in mind the more liberal discretionary approach then in force, and could their intention have been to "reform" the law by replacing applications for appointment of equitable receivers with garnishing orders? Or could the legislative draftsmen have had in mind the frequent appointment of receivers to collect rents and profits from real property where *elegit* was not available? Though *elegit* was not used in Ontario, apparently it was considered to be an available writ. The British Columbia Court of Appeal recently had an opportunity to consider the issue, but if the reasons for judgment are an accurate guide, the consideration accorded was cursory. Speaking for the court in *Access Mortgage, ibid.*, at pp. 261-262, Hutcheon J.A. stated:

Without regard to authority, I think that rent due on October 1st as rent for the month of October is not "payable or accruing due" on September 23rd [when the garnishing order was issued], *nor is it available under equitable execution.* (Emphasis added).

Lower courts are not likely to dissent from this decision, but the interpretation of section 7 cannot be said yet to have been exhaustively or even satisfactorily discussed.

applications have mixed success and the cases are difficult to reconcile if one is simply compiling a list of assets subject to equitable execution as many texts and abridgements do.

The main cause for the lack of consistency has undoubtedly been varying formulations of the first rule. In those cases (and there are many) in which the judgment creditor successfully applied for an equitable receiver to collect near debts not then amenable to garnishment, the question asked by the court, expressly or impliedly, must have been the most general—are debts exigible at law?²⁹ The admittedly more numerous cases in which the court refused to appoint an equitable receiver to collect near debts usually focused on the present garnishability of the specific debt by asking the narrower question—is this particular debt now exigible?³⁰

²⁹ See, for example, *Bagley v. Winsome*, [1952] 2 Q.B. 236, [1952] 1 All E.R. 637 (C.A.); *Goldschmidt v. Oberrheinische Metallwerke*, [1906] 1 K.B. 373 (C.A.); *Lloyds Bank Ltd. v. Medway Upper Navigation Co.*, [1905] 2 K.B. 359 (C.A.); *In Re Pearce*, [1919] 1 K.B. 354 (C.A.); *Sansom v. Sansom* (1878), 4 P.D. 69 (P.D.A.) (though the headnote labels it a sequestration case); *Webb v. Stenton* (1883), 11 Q.B.D. 518 (C.A.); *Gorman v. Young* (1976), 2 C.P.C. 245 (Ont. Dist. Ct.); *Hankey and Co. Ltd. v. Vernon*, [1926] 1 W.W.R. 375 (B.C. Co. Ct.); *Moore v. Nyland*, [1930] 1 W.W.R. 627 (B.C.S.C.); *Imperial Bank of Canada v. Twyford* (1905), 1 W.L.R. 157 (N.W.T.S.C.); *Lavigne v. Robern* (1986), 30 D.L.R. (4th) 756 (Ont. H.C.), (special circumstances); *Manning Wanless Building Supplies Ltd. v. Puskas and Flemke* (1962), 39 W.W.R. 672 (Alta. S.C.); *Martin v. Martin* (1981), 123 D.L.R. (3d) 718 (Ont. H.C.), (in this case the Family Law Reform Act 1978, c. 2 (Ont.) provided for garnishment of future earnings by family creditors, but the provincial legislation could not bind the federal Crown, the employer); *Paulin v. Paulin and Martin*, [1936] 1 W.W.R. 499 (Sask. K.B.); *Sign-O-Lite Plastics v. MacDonald Drugs (Cranbrook) Ltd.* (1980), 115 D.L.R. (3d) 378 (B.C.S.C.); *Re Simon and Simon* (1984), 7 D.L.R. (4th) 128 (Ont. Div. Ct.); *Toronto Dominion Bank v. Berezowsky* (1987), 49 Alta. L.R. (2d) 337 (Alta. Q.B.); *Canadian Film Development Corp. v. Perlmutter* (1986), 8 C.P.C. 237 (Ont. S.C.), (special circumstances); *MacLaine Watson & Co. Ltd. v. I.T.C.*, [1987] 3 W.L.R. 508 (Ch. D.); *Bourne v. Colodense Ltd.*, [1985] I.C.R. 291 (C.A.).

Garry Finance Corporation Ltd. v. Heizman, [1939] 1 W.W.R. 541 (Man. C.A.) appears at first to be a future earnings case but closer examination reveals that the basis for the appointment of an equitable receiver there was execution against goods and not garnishment.

Similarly, *Hudson v. Brisebois Bros. Construction Ltd.* (1982), 135 D.L.R. (3d) 166 (Alta. C.A.) depends on the Alberta Rules of Court, R. 465(1), expressly authorizing the appointment of a receiver for the proceeds of an intended auction sale of goods, a non-garnishable near debt.

³⁰ *Cadogan v. Lyric Theatre Ltd.*, [1894] 3 Ch. 338 (C.A.), (re collection of admission to theatre); *Edwards v. Picard*, *supra*, footnote 11; *Holmes v. Millage*, *supra*, footnote 4; *Manchester and Liverpool District Banking Co. v. Parkinson*, *supra*, footnote 4; *Paquine v. Snary*, [1909] 1 K.B. 688 (C.A.), (alimony); *Access Mortgage Group v. Stuart*, *supra*, footnote 28; *Bedell v. Gefaell*, [1938] 4 D.L.R. 443, [1938] O.R. 726 (Ont. C.A.), (dicta); *Boucher v. Viala*, [1947] 2 W.W.R. 277 (Sask. Dist. Ct.); *C.A.C. Realty Ltd. v. MacNeil* (1981), 37 C.B.R. (N.S.) 272 (Ont. Co. Ct.); *Central Bank v. Ellis* (1893), 20 O.A.R. 364 (Ont. C.A.); *Commerce Capital Mortgage Corp. v. Leung*

One cannot, however, simply count cases and determine which question is right by sheer numbers. To the cases favouring the general question and granting the application for the appointment of an equitable receiver must be added the weighty dicta of the English Court of Appeal in at least two garnishment cases suggesting to counsel that even though garnishment was not available, the debt having been found to be conditional, equitable execution remained an option. Thus in *Webb v. Stenton*³¹ Fry L.J. consoled counsel with this message:

It appears to me that in arriving at this conclusion we are not laying down any rule which will produce a defect in the administration of justice. I think the power of the judgment creditor to obtain a receiver under the practice of the Chancery Division is adequate to meet all that is required, and will prevent any denial of justice.

Such dicta might be discounted on noting that the case predates the constriction on the availability of equitable receivers effected at the turn of the century, but Fry L.J. was echoed by Sir Raymond Evershed M.R. in 1952, in *Bagley v. Winsome*.³²

Furthermore, the fact that an element of public policy runs through many of the cases in which the application for the appointment of an equitable receiver for near debts failed undercuts the authority of these cases as precedents for the narrow question. Where public policy is invoked as the ground for the refusal to appoint an equitable receiver it is implicit that the near debt would have been collectible by a receiver if the public policy considerations were absent. Cases involving alimony and maintenance payments³³ and government pensions and salary³⁴ fall

(1979), 32 C.B.R. (N.S.) 182 (Ont. S.C.); *Dowell v. Aikenhead*, [1961] O.W.N. 174 (Ont. H.C.), ("rule" against appointing a receiver for near debts characterized as a "policy"); *Hobbs v. Attorney-General for Canada* (1914), 7 W.W.R. 256 (Alta. App. Div.); *Kuss v. Kuss*, [1935] 2 W.W.R. 561 (Man. C.A.); *Melvin v. Blore* (1969), 68 W.W.R. 434 (Man. Q.B.); *Re Noriega and Noriega* (1979), 23 O.R. (2d) 520 (Ont. Fam. L. Div.); *Paramount Attraction and Sale Co. Ltd. v. Lust*, [1950] 1 W.W.R. 258 (Alta. Dist. Ct.); *Re Peterson Livestock Ltd. and Fox* (1982), 31 D.L.R. (3d) 716 (Alta. C.A.); *Piluk v. Piluk and Zadorozny* (1962), 38 W.W.R. 315 (Man. Q.B.); *Pundit v. Ruhman* (1987), 49 Alta. L.R. (2d) 367 (Q.B. Mast.); *Simpson v. Simpson* (1934), 49 B.C.R. 288 (B.C.S.C.); *Strang v. Beal*, [1923] 3 D.L.R. 1141 (Ont. S.C.).

³¹ *Supra*, footnote 29, at pp. 530-531.

³² *Supra*, footnote 29, at pp. 244 (Q.B.), 641 (All E.R.). The correctness of the dicta in this case was doubted by the British Columbia Supreme Court in *Bel-Fran Investments Ltd. v. Pantuity Holdings Ltd. and Bank of Montreal*, *supra*, footnote 25.

³³ *Walls Ltd. v. Legge*, [1923] 2 K.B. 240 (C.A.); *Paquine v. Snary*, *supra*, footnote 30; *Watkins v. Watkins*, [1896] P. 222 (C.A.). See also *Hyde v. Hyde* (1888), 13 P.D. 166 (C.A.); *Bolliho & Co. Ltd. v. Gidley*, [1905] A.C. 98 (H.L.); *Hood Barnes v. Cathcart*, [1894] 2 Q.B. 559 (C.A.) as examples of cases in which there were restraints on anticipation by the debtor. Arrears of maintenance are assignable, however, as in *Wolch v. Wolch* (1981), 10 Man. R. (2d) 232 (Man. Q.B.).

³⁴ *Central Bank v. Ellis*, *supra*, footnote 30; *Hobbs v. Attorney-General for Canada*, *supra*, footnote 30; *Paramount Attraction and Sale Co. v. Lust*, *supra*, footnote 30.

within this group. Even some of the strongest judgments on the non-garnishability of future earnings contain public policy justifications.³⁵ Policy considerations are relevant still to the question of appointing equitable receivers, but policy changes over time and what was thought to be contrary to the public interest in the nineteenth century may no longer be so considered today. In any event, it is submitted that the element of public policy must be isolated so as to avoid confusing the formulation and application of the first rule. It is more properly considered at a later stage, and accordingly will be discussed in the next section of this article.

One large group of English cases must be expressly excluded from consideration as they may be misleading both bench and bar in the near debt cases. Equitable receivers were regularly appointed in England to collect the rents and profits of real property.³⁶ However, the basis for such appointments was not that *garnishment* was unavailable, but that the common law process of *elegit* was unavailable by virtue of the nature of the judgment debtor's interest.³⁷ Similarly, in *Croshaw v. Lyndhurst*

³⁵ See, for example, *Holmes v. Millage*, *supra*, footnote 4.

³⁶ See, for example, *Anglo-Indian Bank v. Davies* (1878), 9 Ch. D. 275 (C.A.); *Ashburton v. Nocton*, [1915] 1 Ch. 274 (C.A.); *Blackman v. Fysh*, [1892] 3 Ch. 209 (C.A.); *Cadogan v. Lyric Theatre Ltd.*, *supra*, footnote 30; *In Re Harrison and Bottomley*, [1899] 1 Ch. 465 (C.A.); *Ideal Bedding Co. Ltd. v. Holland*, *supra*, footnote 6; *Smith v. Cowell* (1880), 6 Q.B.D. 75 (C.A.); *Tyrell v. Painton*, [1895] 1 Q.B. 202 (C.A.).

No controversy concerning the *in personam* or *in rem* nature of an equitable interest appears to have surfaced in this branch of the law. For purposes of aiding in the enforcement of judgment debts the courts have treated the equitable interest of a judgment debtor in real or personal property as an interest in the property itself, and not as a mere personal right enforceable against the holder of the legal interest. Thus equitable receivers have been given power to deal directly with the property, though their powers have not been unlimited.

³⁷ *Elegit* is not a writ presently utilized in Canadian jurisdictions. It was presumed to be extant in the early history of execution law but appears never to have been used, and now has either been expressly abolished or replaced for all practical purposes with other modes of execution against land. For a discussion on the history of execution against land in Upper Canada, see W.R. Riddell, "Fi. Fa. Lands" in Upper Canada (1929), 7 Can. Bar. Rev. 448. Since few interests in land are immune from execution at law it is rare for a judgment creditor to apply for appointment of an equitable receiver in Canada on the grounds that there is an impediment to execution at law against the judgment debtor's interest in land. But see discussion in text at footnotes 53 to 56, *infra*. Arguably, *elegit* was a more finely tuned instrument than our present form of execution against land in that the income from the judgment debtor's interest was diverted only so long as the debt remained unsatisfied and, if the income was great enough and the judgment debt small enough, he would ultimately recover the property. Today the only mode of satisfaction is sale of the land though, in British Columbia anyway, the court must approve the execution sale and has a measure of discretion to refuse approval. The judgment creditor must apply under s. 84 of the Court Order Enforcement Act, *supra*, footnote 14, for an order for sale. The debtor must show cause why the land should not be sold. If he fails to do so the court orders the district registrar to inquire as to what land is liable to be sold under the judgment, what the interest of the judgment debtor is, and what other charges exist on title and their priorities, and to prepare a plan for the

*Ship Co.*³⁸ an equitable receiver was appointed to collect the "rents, profits and moneys receivable" in respect of the judgment debtor's interest in a ship and its freight *not* because a garnishing order could not issue but because the sheriff could not seize the ship under a writ of *fiery facias* because of prior encumbrances.³⁹

Obviously some agreement must be reached on the appropriate form of the first rule or condition for appointment of an equitable receiver for personal property. It is submitted that the best formulation is the most general because that formulation is the most favourable to the judgment creditor and so is consistent with the general development of debtor creditor law over the last century and with particular developments in the last decade—developments such as the judicial creation of the *Mareva* injunction and the *Anton Piller* order and legislative innovations such as the continuing garnishing order. There is, moreover, a certain irony in contemplating a state of affairs in which an equitable receiver can no longer be appointed to collect rents and profits arising from real property because "reform" of the law has abolished the writ of *elegit* upon which such relief depended.

The general form of the question will not constitute a license to appoint equitable receivers. Even if, as has occurred in a few recent cases, the whole question of appointing equitable receivers should become a matter of discretion, the other existing rules will still be guidelines for the consideration of the court. Furthermore, in the case of debts, policy considerations and the assignability of the debt will be crucial matters. Rent, for example, is clearly assignable⁴⁰ and no policy against assignments is in evidence. Pensions, support payments and future earnings generally will require individual consideration as will any other asset which the legislature has attempted to protect by way of exempting provisions. The difference will be that the protection afforded either by way of judicially created public policy or by way of legislative enactment will be classified as an impediment to legal execution, and the court will have to decide whether it is "just and convenient" to remove the impedi-

distribution of the proceeds. This report requires confirmation by the Supreme Court, thus giving parties another chance to argue against sale of the land. For cases dealing with execution sales of land under the Court Order Enforcement Act, see *First Western Capital Ltd. v. Wardle* (1985), 59 B.C.L.R. 309 (B.C.C.A.); *Sunglo Lumber v. McKenna*, [1974] 5 W.W.R. 572 (B.C.S.C.); *Canadian Imperial Bank of Canada v. Muntain* (B.C.S.C.), unrep. Nanaimo Registry No. SC2230, June 23, 1981; *Cronkhite Supply Ltd. v. Adams* (1983), 44 B.C.L.R. 159 (B.C.S.C.).

³⁸ [1897] 2 Ch. 154 (Ch. D.).

³⁹ Cf. also *Levasseur v. Mason and Barry*, [1891] 2 Q.B. 73 (C.A.) in which a receiver was appointed with power to sell because the property in question, copper, was in the hands of a third party who had a lien on it for the cost of smelting it.

⁴⁰ See, for example, *Re Mutual Life Assurance Co. of Canada and Boban Construction Ltd.* (1984), 9 D.L.R. (4th) 746 (B.C.S.C.).

ment in a particular case. The nature and effect of such impediments will be discussed in the next section.

If the court persists in using the narrowest formulation of the first rule, equitable receivers will be available on only a very limited basis unless the discretionary approach becomes universal,⁴¹ because the unavailability of a particular legal process of execution will exclude simultaneously the option of an equitable receiver.

B. *Impediments to Legal Execution*

Originally the common law writs available against real and personal property did not catch equitable interests and the equitable nature of the judgment debtor's interest in the property from which the creditor was seeking satisfaction clearly was the impediment which the first equitable receivers were appointed to remove. Nevertheless, although there is one English Court of Appeal decision to the contrary, the process of equitable execution is not limited to removal of only those impediments to legal processes of execution arising from the nature of the judgment debtor's interest. Any practical or legal obstacle to the employment of a legal process of debt collection constitutes an impediment. The case which is inconsistent with this proposition is *Morgan v. Hart*.⁴² In that case the judgment creditor was after furniture belonging to the judgment debtor, but because it was stored in a warehouse with goods belonging to other persons, and because the warehouseman refused to identify the judgment debtor's furniture, the sheriff could not seize under a writ of *fieri facias*—at least not without incurring the risk of suit for trespass if he seized the goods of a third party. On the grounds that this practical difficulty was not the kind removable by Courts of Chancery before the Judicature Acts, 1873, the Court of Appeal refused to appoint an equitable receiver. The statement in the case that equity removes only impediments arising from the nature of the judgment debtor's interest and not from practical difficulties is one that cannot be reconciled with earlier Court of Appeal decisions or with later decisions in a variety of courts, but the refusal to appoint a receiver in the particular case is defensible as one might legitimately ask what a receiver could have done to identify the goods that neither the judgment creditor nor the sheriff could accomplish.⁴³ The weight of authority indicates that *Morgan v. Hart* is an aberration.

⁴¹ *Lavigne v. Robern*, *supra*, footnote 29; *Martin v. Martin*, *supra*, footnote 29; *Re Simon and Simon*, *supra*, footnote 29.

⁴² *Supra*, footnote 4.

⁴³ *Cf.* the Canadian case of *Langstaff v. Squirrel*, [1924] 2 D.L.R. 930 (Sask. C.A.). The judgment debtor was the legal owner of lands leased on a share crop lease: one third of the crop would belong to the judgment debtor after threshing. Without deciding on the exact nature of the judgment debtor's interest in the crop, the Saskatchewan Court of Appeal refused to appoint a receiver. Neither a sheriff nor a receiver could do anything until the crop was harvested and threshed so no benefit would accrue to the creditor from the appointment of an equitable receiver.

One early case irreconcilable with *Morgan v. Hart* is *Brereton v. Edwards*,⁴⁴ the case which completed the process commenced in *Watts v. Jeffreys*⁴⁵ of creating the equitable charging order. In *Brereton v. Edwards* the judgment debtor was entitled to a fund in Chancery. The judgment creditor successfully applied for an order charging the fund in his favour. The case is significant not only for the fact that it confirmed the existence of a new remedy, the equitable charging order, but also for the fact that this new remedy was described as a short cut to the usual or traditional method⁴⁶ of obtaining satisfaction from funds in court, the appointment of an equitable receiver.⁴⁷ If the method of obtaining relief before the creation of the equitable charging order was appointment of an equitable receiver, it follows that equity was not confined to removal only of impediments arising from the nature of the judgment debtor's interest. The impediment to garnishment or to seizure of money and banknotes under a writ of *fieri facias* was simply the location of property. This is the same kind of practical difficulty that existed in *Morgan v. Hart*. It is not an impediment arising from the nature of the debtor's interest.

Other cases at odds with the proposition in *Morgan v. Hart*, that equity relieves only against those impediments arising from the nature of the judgment debtor's interest, are those in which relief was afforded by the appointment of an equitable receiver when the Crown could not be garnished.⁴⁸ Again, the impediment in those cases lies not in the equitable nature of the judgment debtor's interest but in the legal impossibility of issuing process against the Crown. This difficulty is slowly

⁴⁴ (1888), 21 Q.B.D. 488 (C.A.).

⁴⁵ (1851), 3 Mac. & G. 422, 42 E.R. 324 (Ch.).

⁴⁶ See *Westhead v. Riley* (1883), 25 Ch. D. 413 (Ch. D.).

⁴⁷ That appointment of a receiver is an appropriate mode of reaching funds in courts should be of interest to British Columbia creditors. *Dhalla v. King Lung Commodities Ltd.* (1984), 59 B.C.L.R. 130 (B.C.S.C.) recently held that a court could make an equitable charging order only over funds in its control. Funds in another level of court, the County Court, were therefore not chargeable by the Supreme Court. Creditors in British Columbia thus have three means of reaching funds in court: the equitable charging order where the fund is in the control of the court from which judgment was obtained and whose processes must be used to obtain satisfaction; application pursuant to s. 26 of the Creditor Assistance Act, R.S.B.C. 1979, c. 80, which will result in a sharing of that fund with other creditors; and an equitable receiver. Arguably, of course, s. 26 of the Creditor Assistance Act constitutes legal execution and a receiver should be appointed only when some impediment to use of s. 26 exists—or there are special circumstances.

⁴⁸ *Sansom v. Sansom*, *supra*, footnote 29; *Finning Tractor and Equipment Co. Ltd. v. Way Mar Enterprises* (B.C.S.C.) unreported Vancouver Registry No. C772350 2978; *Gorman v. Young*, *supra*, footnote 29; *Martin v. Martin*, *supra*, footnote 29; *Re Peterson Livestock Ltd. and Fox*, *supra*, footnote 30 (dicta to the effect that if there had been a garnishable debt satisfying rule one the fact that the debt was due from the Crown might be considered an impediment).

disappearing in Canada as the various Crowns remove or reduce Crown immunity,⁴⁹ but the principle that an impediment can consist of any practical or legal obstacle to legal execution remains operative for equitable execution.

There is some Canadian authority for asking whether there is an impediment to legal execution against *any* assets belonging to the judgment debtor, thus requiring all processes of legal execution to have been exhausted before an application is made for appointment of an equitable receiver.⁵⁰ This authority is old and is inconsistent with the weight of English cases holding that it was not a necessary condition that legal processes actually have been attempted, even against the particular asset sought.⁵¹ It is also inconsistent with recent authority,⁵² but the confused state of the law concerning equitable receivers preserves the possibility of its re-emergence. Nevertheless, though not a part of the second rule, the existence of other property which is exigible and which would be worth proceeding against is a factor which should be considered in deciding the ultimate issue, whether the appointment of a receiver is just and convenient.⁵³ For the second rule, however, the proper approach is to ask only whether there is an impediment to execution at law against the particular asset for which the receiver is desired.

Where the legal execution processes available in a province fail to catch particular interests in real or personal property, then the judgment creditor has what might be described as a classic case of eligibility for appointment of an equitable receiver. The greater the range of interests exigible by ordinary processes, the fewer the opportunities for the intervention of equity. Thus, in British Columbia applications for equitable receivers for interests in real property will be rare because the Court Order Enforcement Act⁵⁴ apparently renders exigible the full range of interests in real property, but the law is not so clear in some other provinces⁵⁵ so more such applications for appointment of an equitable receiver arise.

⁴⁹ E.g., Family Orders and Agreements Enforcement Assistance Act 1986 (Can.), c. 5; Garnishment Attachment and Pension Diversion Act 1980-81-82-83 (Can.), c. 100; Interpretation Act, R.S.B.C. 1979, c. 206, s. 14; Court Order Enforcement Act, *supra*, footnote 14. Family creditors typically are given the benefit of the reduced immunity first.

⁵⁰ *Davidge v. Kirby* (1903), 10 B.C.R. 231 (B.C.S.C.). See also *Stoebr v. Morgan*, [1929] 4 D.L.R. 301 (Sask. C.A.) where the issue was discussed.

⁵¹ E.g., *Ashburton v. Nocton*, *supra*, footnote 36.

⁵² *N.E.C. Corp. v. Steintron International Electronics Ltd.* (1985), 67 B.C.L.R. 191 (B.C.S.C.).

⁵³ As it was in *First Western Capital v. Wardle* (B.C.S.C.) unreported Vancouver Registry No. H821210 September, 1984.

⁵⁴ *Supra*, footnote 14.

⁵⁵ See *Dunlop, op. cit.*, footnote 4, pp. 175-185.

ing from the nature of the debtor's interest in real property should be expected there.⁵⁶

A similar generalization can be made as to the exigibility of legal and equitable interests in personal property. Where the law is clear that such interests are exigible the opportunity or need for appointment of an equitable receiver is reduced or eliminated. Where a particular interest is immune from legal process a classic case exists for the appointment of an equitable receiver. For example, an interest in one class of personal property that has consistently escaped creditors in several provinces is a joint interest in a debt. Thus, where a third party, the potential garnishee, owes money to the judgment debtor and some other person not indebted to the potential garnishor, that money cannot be garnished. The most common form of joint debt is, of course, the joint bank account. Arguably this is exactly the situation for which equitable execution was developed: the debt, an ordinary bank account, is exigible (satisfying either the broad or the narrow version of the first rule), but an impediment exists arising from the nature of the judgment debtor's interest. An equitable receiver appointed in such a case could do what Canadian courts have refused to attempt, ascertain what portion of the debt is owed to the judgment debtor.

Reported cases reveal that two major kinds of difficulty in employing legal processes of execution induce judgment creditors in Canada to apply for the appointment of an equitable receiver. These difficulties, of course, can be characterized as impediments within the meaning of the second rule only if the first rule is applied in the broad formulation outlined above. The first kind arises in the context of garnishment and consists of the conditions or contingencies which prevent the immediate use of that process. The second kind of impediment consists of protective provisions enacted by various legislatures for specific assets. There is an overlap between the first and second kinds of impediment as some of the assets protected by statute are debts. For near debts the question, in the absence of legislative protection, is simply one of the formulation of the first and second rules and the exercise of discretion, deciding whether an equitable receiver would be just and convenient. Statutory impediments are somewhat more complex and will be discussed first.

To date, the treatment of these statutory impediments cannot be said to have been consistent. Sometimes they have been considered relevant to the first rule and sometimes to the second. In other words, the provision may be held to have rendered the asset immune from execution or the provision may be considered to have created an impediment to execution. Sometimes a provision is read up so as to protect the debtor and sometimes it is read down to protect the judgment creditor.

⁵⁶ As was suggested in dicta in *Kimniak v. Anderson*, [1929] 2 D.L.R. 904 (Ont. App. Div.).

The legislative assumption common to all such statutory provisions is that the asset would be exigible in the absence of such provision. This is an important point to note since the first rule requires exigibility by legal process. If the court is using the broad formulation of the first rule the answer in the face of the statutory provision remains affirmative. If the first rule is satisfied the court must decide whether the impediment should be removed. That should turn, in part, on statutory interpretation. The court must determine whether the provision confers absolute or qualified protections. If absolute, then an equitable receiver should be appointed only in cases in which it is clear that the judgment debtor is deliberately rendering himself judgment proof. If qualified, however, removal of the impediment is appropriate to the extent of the qualification or for the benefit of the exempted class of creditors or in circumstances of judgment proofing.

For example, the Homestead Act⁵⁷ of British Columbia bestows only qualified protection. Registered homesteads were intended to be given a monetary protection, not an absolute immunity from the legal process of execution:

s. 4 A homestead, after it has been registered, shall be free from forced seizure or sale by any process for or on account of a debt or liability incurred after the registration of the homestead, except that in case the homestead is, at the time of the suing out of process, of a greater value than \$2,500, then only as much of the homestead is liable to seizure or sale as exceeds \$2,500.

However, the legislature, possibly misreading its own legislation, subsequently created an enlarged immunity by providing in what is now section 43 of the Court Order Enforcement Act⁵⁸ that:

Nothing in this Part shall in any way limit the *Homestead Act*, and this Part does not apply to land registered under the *Homestead Act*, or to pre-emption claims.

Thus, the intention of the legislators, which was evidently to guarantee to homesteaders protection for \$2,500 worth of their real property, was converted to an immunity from legal process. This legislative confusion has gone unchallenged because no one bothers to register land as a homestead, but on an application for appointment of an equitable receiver it would be appropriate to appoint one to recover the unprotected amount over \$2,500, thereby removing the impediment created by section 43.

The Exemptions Act⁵⁹ of Saskatchewan provides, on the other hand, for an apparent absolute exemption from execution for a defined parcel of real property:

s. 2 (1) The following real and personal property of an execution debtor and his family is hereby declared free from seizure by virtue of writs of execution, namely . . .

⁵⁷ R.S.B.C. 1979, c. 173.

⁵⁸ *Supra*, footnote 14.

⁵⁹ R.S.S. 1978, c. E-14, s. 2.

10. the homestead, provided the same be not more than one hundred and sixty acres; and if it is the surplus may be sold subject to any lien or incumbrance thereon.

The Saskatchewan Court of Appeal in *Stoehr v. Morgan*,⁶⁰ obviously using the narrow formulation of the first rule, held that as homesteads were not exigible, an equitable receiver could not be appointed. Had the question been whether *land* was exigible, the answer would have been affirmative and the Court of Appeal would have had to face the difficult question, discussed below, whether equity should remove the impediment of the Exemption Act. The answer probably would have been properly the same as the legislation is designed for the protection of the family as much as for the individual debtor and so should be ignored only in extreme circumstances.

A pair of Ontario cases involved good examples of typical pension legislation protection. In *Re Simon and Simon*⁶¹ the applicant for an equitable receiver was the former wife of an employee of Ontario Hydro, and the debt she was attempting to satisfy was one for support. The property she sought was the pension to which her former husband would eventually become entitled. The Pension Benefits Act⁶² provided what looked like absolute immunity for the pension from ordinary creditors, but made an exception for family creditors:

s. 27(1) Moneys payable under a pension plan shall not be assigned, charged, anticipated or given as security and are exempt from execution, seizure or attachment, and any transaction purporting to assign, charge, anticipate or give as security such money is void.

(2) Notwithstanding subsection (1), where a person is receiving payment under a pension plan to satisfy the payment of pension benefits to which the person is entitled, the payment is subject to execution, seizure or attachment in satisfaction of an order for support or maintenance enforceable in Ontario.

The problem for Mrs. Simon was that her ex-husband was not yet receiving his pension so no legal process was immediately available, but the legislature clearly contemplated execution by legal process by just such creditors as Mrs. Simon.⁶³ The Ontario High Court, however, considered that the statute rendered the pension a non-exigible asset within the meaning of the first rule and was able to appoint a receiver to help Mrs. Simon only by holding that the rules could both be disregarded in spe-

⁶⁰ *Supra*, footnote 50. The legislation in force at the date of the decision was not materially different from that set out in the text; see R.S.S. 1920, c. 51, s. 2.

⁶¹ *Supra*, footnote 29.

⁶² R.S.O. 1980, c. 373, as amended S.O. 1983, c. 2, s. 5.

⁶³ The Workers Compensation Act, S.A. 1981, c. W-16, s. 135, in issue in *Pundit v. Ruhman*, *supra*, footnote 30, provides another example of qualified immunity as the Board is given discretion to permit the compensation payments to be assigned or attached:

Except as otherwise provided in this Act, no sum payable as compensation or by way of commutation of any periodical payment in respect of it, is capable of being assigned, charged or attached *unless the Board gives its approval*. (Emphasis added).

cial circumstances, an extension of that exception to the rules which will be discussed below. On the analysis suggested here the court should have held the first rule satisfied (as debts are garnishable) and should have removed the impediment because Mrs. Simon was not one of the class of creditors intended to be prohibited from seizing the asset.

The Public Service Superannuation Act⁶⁴ in issue in *Lavigne v. Robern*⁶⁵ makes a similar exception for family creditors:

s. 9(8) Except as provided by Part II of the *Garnishment, Attachment and Pension Diversion Act*, amounts payable under this Part are not capable of being assigned, charged, attached, anticipated or given as security and any transaction purporting to assign, charge, attach, anticipate or give as security any such amount is void.

The applicant in that case, however, was an ordinary creditor so was unable to take advantage of the exception in favour of family creditors. For him the immunity from legal processes of execution for the pension was apparently absolute. Again the Ontario High Court held that the first rule was unsatisfied but chose to ignore all the rules and give equitable relief. As this was a case of attempted judgment proofing by the judgment debtor disregard of the legislative protection would have been appropriate even on a rule-based approach explained below.

In summary, the rules need not be ignored if the first rule is posed in a broad formulation. That approach converts or reduces the statutory provision to an impediment. The court will then have to consider whether equitable relief from the impediment should be given. Where the legislative protection from the legal processes of execution is qualified in favour of a particular class of creditors then a creditor falling within that class should be aided in overcoming other impediments by the appointment of an equitable receiver where circumstances prevent invocation of the exception and where some benefit would accrue. Such a result simply ensures fulfilment of the legislative intention. However, where the legislative protection is apparently absolute insofar as any legal process of execution or any voluntary assignment is concerned the court should be extremely cautious in removing this impediment by the appointment of an equitable receiver. Nevertheless, circumstances such as those in *Lavigne v. Robern*, which reveal an attempt at concealment of assets and arrangement of affairs with the object of judgment proofing of the judgment debtor, should be sufficient to permit the court to circumvent the legislative impediment by appointing an equitable receiver.⁶⁶ Appointment of an equitable receiver in such circumstances cannot be seen as a

⁶⁴ R.S.C. 1970, c. P-36, as amended S.C. 1980-81-82, c. 100, s. 39.

⁶⁵ *Supra*, footnote 29.

⁶⁶ This element of fraud is not infrequent. See also, e.g., *Attorney General of Canada v. Rahey* (1981), 125 A.P.R. 319, at p. 321 (N.S.T.D.) in which the evidence persuaded the court that Carl Rahey "had contrived to filter substantial sums of money through an elaborate scheme of corporate and trust arrangements erected for the purpose of defeating his creditors"; *Martin v. Martin*, *supra*, footnote 29; *NEC Corporation v.*

frustration of legislative intention because the legislature must have had the honest but impecunious debtor in contemplation in enacting protection for particular benefits, not the debtor who attempts to delay, hinder and defraud his creditors. The issue should not depend on whether the words describing any of the processes prohibited by the provision in question include equitable execution, but on whether it is just and convenient in the particular case to remove the impediment. Nevertheless, if a legislature in its wisdom decides to prohibit equitable execution expressly the question will be foreclosed. Until then, however, courts should be prepared to defer to legislative impediments in the ordinary case, but to circumvent them in special cases by appointing equitable receivers. Unlike impediments arising from the nature of a judgment debtor's interest in property, impediments created by statute are not fortuitous. Thus they should be circumvented by equity with greater caution than impediments arising from the nature of the judgment debtor's interest have been. It would be extraordinary, for example, for a court to disregard the impediment created by statutes exempting necessities for the benefit of the debtor and the debtor's family. The court will have to take into account the identity of the judgment creditor and the disposition of property other than that protected by statute. Family creditors likely will remain favoured more than outside ordinary creditors, but disposition of other property or arrangements of affairs for the purpose of judgment proofing should carry the day, even for the latter.

Just as legislative policy protecting certain assets must be carefully considered so must the judicial policy against impounding future earnings, especially the future earnings of public servants, be reconsidered. If the analysis suggested here is accepted, then near debts such as future earnings would be considered exigible under the first rule and the crucial issue for the court would be whether the impediment constituted by the condition or contingency preventing garnishment should be overcome by the appointment of an equitable receiver.

The easiest aspect of this package of judicial policy concerns public servants. Early cases exhibited a high regard for the office and thus hostility to attempts to obtain satisfaction from the fruits of the office. The fact that by legislation Crown immunity from execution processes aimed at benefits payable to public servants is gradually disappearing should be sufficient to eliminate any judicially created protection for judgment debtors who happen to be public servants. The trend is clear and there is no reason to maintain an anachronistic policy.

The more difficult aspect concerns future earnings. Some cases have indicated a possible distinction between future wages and salary and

Steintron International Electronics Ltd., *supra*, footnote 52; *Re Simon and Simon*, *supra*, footnote 29; *Bancorp Financial Ltd. v. 234509 B.C. Ltd.* (1986), 62 C.B.R. (N.S.) 311 (B.C.S.C.); *Canadian Film Development Corp. v. Perlmutter*, *supra*, footnote 29.

future earnings from a business, implying that the latter needs less protection than the former. Some judgments in which an equitable receiver was refused relied on policy considerations as has been mentioned, but most judgments turn on the narrow formulation of the first rule. Two observations can be made about the policy considerations which were enunciated to justify the refusal to appoint a receiver to collect future earnings. First, judicial hostility in the English cases to requests for receivers to collect future earnings is not surprising. English law did not even permit general garnishment of wages and salary until 1970.⁶⁷ For Canadian judges to exhibit the same hostility in jurisdictions in which garnishment of wages was permitted was not to be anticipated. The second observation may explain the Canadian attitude. Applicants for appointment of an equitable receiver may have been too greedy. By seeking to collect the whole salary instead of a portion they may have raised the spectre of destitution for the debtor and his family. There is no reason today to perpetuate a policy barring collection of future earnings by an equitable receiver. The garnishment process already interferes with employer/employee relations so the concern exhibited in English cases to avoid that consequence is misplaced. Furthermore, since the statutory authority empowering the courts to appoint equitable receivers also authorizes the imposition of terms and conditions, the receiver may be appointed to collect only a fixed percentage of the wages and salary equivalent to the percentage rendered garnishable by statute. Finally, the fact that there is now some legislative authority for continuing garnishing orders both for family creditors and in some provinces for ordinary creditors, should support arguments to the effect that future earnings should no longer be considered sacrosanct.⁶⁸

C. *The Benefit To Be Obtained—Justice and Convenience*

Even where the applicant for appointment of an equitable receiver satisfies the court that the property is exigible and that an impediment exists to employment of some legal process, he will not be entitled as of right to the order sought. The court must also be satisfied that some benefit will accrue to the applicant as a result of such appointment and that appointing an equitable receiver is just and convenient in all the circumstances. The value or probable value of the asset to be collected and the cost of appointing a receiver must be weighed.⁶⁹ Where, for

⁶⁷ See Dunlop, *op. cit.*, footnote 4, pp. 213-214.

⁶⁸ Four provinces have continuing garnishment for ordinary creditors: Ontario, Rules of Court Procedure, R. 60.08(8); Nova Scotia, Civil Procedure Rules, R.R. 53.02(1)(a), 53.05; Prince Edward Island, Garnishee Act, R.S.P.E.I. 1974, c. G-2, s. 17(5), Rules of Court R. 53; Yukon, Garnishee Act, 1980 (1st) (Y.T.), c. 12, ss. 4, 11(2) 13.

For legislation authorizing continuing garnishing orders for family creditors, see Dunlop, *op. cit.*, footnote 4, Second Cumulative Supplement, pp. 239-246.

⁶⁹ *E.g., Walls Ltd. v. Legge*, *supra*, footnote 33; *Edwards v. Picard*, *supra*, footnote 11; *Manufacturers Lumber Co. v. Pigeon* (1911), 24 O.L.R. 354 (Ont. C.A.);

example, a receiver would have been appointed because the nature of the debtor's interest prevented the use of a writ of *elegit*, no receiver would be appointed without evidence that there were in fact or would be some rents and profits for the receiver to collect. *Collins v. Hall*,⁷⁰ a case containing some very strong statements as to the non-exigibility of future earnings, can be explained alternatively as an exercise of discretion as to the justice and convenience of appointing a receiver. The unsatisfied judgment in that case was against a law firm, Hall and Hall. A writ of execution had been returned *nulla bona* so the judgment creditor applied for appointment of an equitable receiver "in respect of" book debts and assets of the past firm, the income of the present firm, and rent from premises owned by the estate of a deceased partner. Evidence was given to the effect that the remaining partners had no assets other than income from the firm. In the case of one partner, B.C. Hall, no income at all was being received. The second surviving partner, eighty-eight years of age and blind, was the recipient of a gratuitous pension from the firm and from a Utilities Commission. The possibility that there might be some uncollected book debts evidently did not amount to a benefit sufficient to warrant the appointment of a receiver.

The costs of an equitable receiver may vary with the person appointed, of course. It is a common practice in some Canadian jurisdictions to ask the courts to appoint the sheriff as receiver. As there are no exclusions from the class of persons eligible for appointment the creditor could even ask that he himself be receiver.⁷¹ Either would be less expensive than, for example, a trust company. The costs obviously will depend on the terms and conditions of the appointment. Collection of monies is simple. Sale of property collected is less so. Management of property or a business can be complex.

The cases reveal the same lack of consistency with respect to the powers of a receiver as they do with respect to the rules for appointment. The weight of English authority authorizes a court to empower a

Sign-O-lite Plastics Ltd. v. MacDonald Drugs (Cranbrook) Ltd., *supra*, footnote 29. But *cf.*, *Tyrell v. Painton*, *supra*, footnote 36, where a receiver was appointed because he "might possibly be useful".

⁷⁰ [1938] O.W.N. 477 (Ont. H.C.).

⁷¹ As was done in *Kuss v. Kuss*, *supra*, footnote 30, though the order was discharged on appeal on the grounds that future earnings were immune. In *Yorkshire Trust Co. v. 239745 B.C. Ltd. and Day*, *supra*, footnote 21, the applicant company sought to have its vice president appointed equitable receiver for an R.R.S.P. The court refused the application (on other grounds) but was concerned about a potential conflict of interest. Since both the judgment creditor and the judgment debtor want the maximum return from the property so as to reduce or satisfy the debt, it is difficult to see how there could be a conflict of interest in the ordinary case. See *Flegg v. Prentis*, [1892] 2 Ch. 428 (Ch. D.); *Re No. 39 Carr Lane, Acomb. Stevens v. Hutchinson and Another*, [1953] 1 All E.R. 699 (Ch. D.) for examples of successful applications by the judgment creditor to have himself or herself appointed receiver.

receiver to sell,⁷² to manage,⁷³ and even to litigate.⁷⁴ Canadian courts have had doubts about the power to sell⁷⁵ and requests for an equitable receiver-manager have been rare. Since the enactments empowering the courts to appoint equitable receivers⁷⁶ contain no restrictions as to the powers that may be conferred, the English practice is probably correct. Nevertheless, the court must always be satisfied that the duties imposed on the equitable receiver are not too expensive and too complex.

A more basic question relating to this discretionary issue is that which asks whether there is anything the receiver can do that the sheriff executing a writ could not. This is an important question when the impediment is a practical one rather than one arising from the nature of the judgment debtor's interest or when the receiver is being appointed on the basis of the special circumstances exception discussed in the next section. If the courts discovers that the sheriff and the receiver are equally impotent then the application for appointment of a receiver should fail.

Ultimately the question for the court is whether the appointment is just and convenient in all circumstances. Even if all the rules are satisfied and substantial benefit will accrue to the judgment creditor by the appointment, the court may still refuse the order if the appointment will produce an unjust result for the judgment debtor. Thus in *Yorkshire Trust Co. v. 239745 B.C. Ltd. and Day*⁷⁷ the Supreme Court of British Columbia refused to appoint a receiver for a Registered Retirement Saving Plan because the judgment for which the creditor was seeking satisfaction was under appeal. It was reasoned that if the appeal were to succeed, there would be no way the appellant could be put back in the same position if the receiver had collapsed the Plan and Revenue Canada had collected the tax due. While one might suggest that the receiver could have been appointed on condition that he delay acting until the appeal was heard, the principle is clear: the appointment must be fair to both parties.

⁷² *Levasseur v. Mason and Barry*, *supra*, footnote 39; *Levermore v. Levermore*, [1979] 1 W.L.R. 1277, [1980] 1 All E.R. 1 (Fam. Div.); *In Re Pearce*, *supra*, footnote 29.

⁷³ *In Re Pearce*, *ibid.*, but *c.f.* *Cadogan v. Lyric Theatre Ltd.*, *supra*, footnote 30, in which Davey L.J. was worried about the prospect of a receiver personally taking admission at the door.

⁷⁴ *Levermore v. Levermore*, *supra*, footnote 72.

⁷⁵ *Goodbun v. Mitchell*, *supra*, footnote 23; *Herold v. Budding* (1916), 37 O.L.R. 605 (Ont. S.C.). Since *Vancouver A & W Drive-Ins Ltd. v. United Food Services Ltd.*, *supra*, footnote 8, in which Fulton J. decided that a receiver could be empowered to sell the issue has not been reargued in British Columbia.

⁷⁶ See the legislation cited, *supra*, footnote 5.

⁷⁷ *Supra*, footnote 21.

D. *Special Circumstances*

At virtually the same time as the English Court of Appeal circumscribed the availability of equitable receivers by creating rigid rules it created an exception to those rules. The seminal case was *Manchester and Liverpool District Banking Co. v. Parkinson*,⁷⁸ but because the applicant in that case did not convince the Court of Appeal that any exception to the rules should be made for him, that case is not the one most frequently cited as authority for the special circumstances exception. That honour goes to *Goldschmidt v. Oberrheinische Metallwerke*,⁷⁹ a case decided some eighteen years later, but the first in which the applicant managed to establish the existence of special circumstances to the satisfaction of the Court of Appeal.

The applicant in the *Manchester and Liverpool District Banking Co.* case wanted a receiver appointed to collect the furniture of the judgment debtor, debts owing to the debtor's business and the business itself, and he wanted the receiver to have power to sell. Successful initially, the judgment debtor saw his order set aside on appeal. The court was somewhat mystified as to exactly what was comprised in the third category, the business, so they focused on the other assets which the receiver was to collect, the furniture and the debts due the business. Because the evidence disclosed no impediment to use of the ordinary processes of garnishment and *fieri facias* the case was considered not to be a proper one for the intervention of equity. The court suggested, however, that the absence of an impediment might not always render unnecessary the intervention of equity. Special circumstances might exist which would render the appointment of a receiver appropriate even where execution by legal process remained available. One example suggested was that of removal of property involving an element of fraud.

The *Goldschmidt* facts fit the suggested example. The judgment debtor there was a German company which did not carry on business in England. Its only assets in England consisted of debts due to it and about to come due to it from its English customers. There appeared to be no significant impediment to garnishment. The judgment creditor was the agent for sale in England of the German company's products and so could identify the customers, even though the particulars of the debts owing were said not to be known. Nevertheless, the Court of Appeal considered that the circumstances were special in that a receiver would be more convenient than a multiplicity of garnishing orders and, more important, in that the company was likely to remove the funds on receipt, so making itself judgment proof in England.

⁷⁸ *Supra*, footnote 4. See also *Harris v. Beauchamp Bros.*, *supra*, footnote 4.

⁷⁹ *Supra*, footnote 29.

The *Goldschmidt* case is the key to comprehension of the relationship between the special circumstances exception to the rules and the rules. Unfortunately the case is open to more than one interpretation.

The first possible reading of the case is that the special circumstances exception can override both rules: the asset need not be exigible and there need be no impediment to execution by legal process. This reading arises from the fact that some of the debts owing to the German company were said to be about to come due. Possibly, then, these were ungarnishable contingent liabilities. If the Court of Appeal was employing a narrow formulation of the first rule, the case constitutes an instance of special circumstances overriding the first rule.

The other and, it is submitted, better reading of the case is that the debts about to come due were debts for which the time for payment was postponed so that they were garnishable at the time of application for appointment of a receiver. Alternatively, the Court of Appeal could (and arguably should) have been employing the broad formulation of the first rule, the formulation that asks whether debts generally are garnishable. Either alternative requires application of the first rule. In light of *Manchester and Liverpool Banking Co. v. Parkinson* and of the fact that there is no discussion in *Goldschmidt* as to the garnishability of debts about to come due, this interpretation seems the most natural.

As created, then, special circumstances justify equitable intervention only in cases in which execution by means of some legal process is available, the asset being exigible, but execution by legal process would be pointless or less efficient by reason of the special circumstances. Only the second rule is affected. Use of the special circumstances exception to render irrelevant both rules converts equitable execution into a residual supplement to execution by legal processes, a consequence which the courts, by the turn of the century, had clearly decided was not permissible.

The *Goldschmidt* case is cited often in recent Canadian cases. The special circumstances exception is clearly received law. With increasing frequency the courts rely on the existence of special circumstances to justify the appointment of an equitable receiver. Some of these cases are classic examples of the *Goldschmidt* approach. In *McCart v. McCart and Adams*⁸⁰ the applicant could have garnished the numerous small sums owing to her husband, the doctor, but the amount of the sums due was insignificant compared with the cost of multiple garnishment orders, so it was held more just and convenient to appoint a receiver. *Garry Finance Corp. v. Heizman and Smith*⁸¹ is a similar example of the cost of legal execution, seizure and sale of vehicles, exceeding the amount to

⁸⁰ [1947] O.W.N. 48 (Ont. H.C.).

⁸¹ *Supra*, footnote 29.

be levied, thus rendering an equitable receiver a more just and convenient mode of satisfaction. In *NEC Corp. v. Steintron International Electronics Ltd.*⁸² the special circumstance relied on was the same as that in *Goldschmidt*, the likelihood that the property would be removed from the jurisdiction.

In some recent cases, however, special circumstances have been used to avoid what the court has considered to be a failure to satisfy the first rule—the non-exigibility of the asset.⁸³ The ultimate result is desirable but the analysis in these cases is faulty on two counts.

The first error lies in holding the asset to be one immune from execution. This occurs because the first rule concerning exigibility is too narrowly formulated. The apparent non-exigibility should be considered an impediment. If there is an impediment, of course, the *Goldschmidt* exception is inapplicable. Special circumstances allow the appointment of an equitable receiver only when there is *no impediment* to remove. Removal of impediments is what the classic cases of equitable execution are all about. Discussion of special circumstances in a case in which there is an impediment to employment of the legal process would be a different use of the phrase and of the special circumstances exception to the rules. It would be a confusing mode of saying that it is just and convenient to circumvent the impediment set up deliberately by the legislature, but arguably designed for protection of a different type of judgment debtor.

If, on the other hand and contrary to the thesis advocated here, the first rule is properly formulated in a narrow manner such that in a given case an asset is not exigible by means of some legal process, use of the *Goldschmidt* exception to circumvent the first rule is a use not sanctioned by the English cases which created the exception. It may be a justifiable extension if equitable receivers are to constitute an available form of relief, but it must be recognized as an extension which transforms equitable execution into a residual supplement to execution at law. The merit of the Ontario case of *Lavigne v. Robern*⁸⁴ is that the court there makes no pretence of fitting the decision to appoint an equitable receiver into the framework of the rules outlined here:

I prefer to hold that granting relief by way of equitable receiver will always be discretionary unless the legislator very clearly and expressly provides otherwise. He has not done so in s. 9(8) of the Public Service Superannuation Act. At any rate the rules governing "equitable execution" are still very much in the making.

⁸² (1985), 67 B.C.L.R. 19 (B.C.S.C.). See also *Bancorp. Financial Ltd. v. 234509 B.C. Ltd.*, *supra*, footnote 66; *National Trust Co. v. United Services Funds* (B.C.S.C.) unrep. Vancouver Registry No. C864336 Oct. 24, 1986.

⁸³ *Martin v. Martin*, *supra*, footnote 29; *Re Simon and Simon*, *supra*, footnote 29, *Lavigne v. Robern*, *supra*, footnote 29.

⁸⁴ *Ibid.*, at p. 760.

Whether the courts should so transform equitable execution is an issue which must be seriously considered, especially when abandonment of the rules is not necessary.

Conclusion

The law of debtor and creditor has developed piecemeal over the centuries, though the last century and a half has seen the greatest changes. Until the last decade the process in Canada has been one of patchwork borrowing and amendment, so it is not surprising to find gaps and inconsistencies between various processes. What rational explanation can there be, for example, for limiting pre-judgment garnishment to liquidated debts and for requiring strict compliance with the letter of the law when *Mareva* injunctions are so freely available? Equitable execution has been unique in that the inconsistencies are to be found largely within the process itself.

Courts in British Columbia and Ontario are evidencing an increased receptiveness to applications for the appointment of an equitable receiver. Ontario judges have expressly recognized the anomaly of liberally granting *Mareva* injunctions while restricting equitable receivers when both are authorized by the same provision, and the courts are prepared to go so far as to ignore the rules.

A return to unrestrained discretion might be desirable from the point of view of judgment creditors—if they could be sure that all judges would exercise the discretion to appoint receivers freely—but a purely discretionary approach is, it is submitted, unnecessary if a broad formulation of the first rule is consistently employed. Untrammelled discretion has a notoriously short lifespan, moreover, so the rules will resurface as guidelines. Even as guidelines—factors to be considered in the exercise of discretion—some agreement as to content is desirable.

The approach suggested here is one for which there is considerable authority. The weakness of that authority is that it is often only implicit. The explanation for the cases is either that the broad formulation of the first rule was employed or that the first rule was overlooked, and it is impossible to ascertain which is the true explanation.

The advantage of consistently employing a broad formulation of the first rule, a formulation which asks whether a general class of property is exigible by means of a legal process instead of whether the specific item is exigible, is that it avoids the need to fall back on pure discretion. The court will be able to focus on the difficult issue of whether it is just and convenient in the circumstances of the case to remove the particular impediment in light of modern policies and approaches, and will not be forced to use the special circumstances exception in a manner not contemplated at its creation and which thus merely confuses the rules.